

**IN ARBITRATION PROCEEDINGS PURSUANT TO  
THE PARTIES MEMORANDUM OF AGREEMENT**

In the Matter Between

**San Jose Police Officers Association,  
Employee Organization**

and

**City of San Jose,  
Employer**

**Re: Contracting Out/Civilianization**

**Arbitrator**

**Carol A. Vendrillo, Esq.**

**December 7, 2012**

***Appearances:***

***For the Employee Organization:***

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***For the City:***

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## INTRODUCTION

This case involves the allegation by the San Jose Police Officers' Association that the City of San Jose violated Article 51.1 and 51.2 of the parties' Memorandum of Agreement when it announced its intention to outsource the functions of background investigators. Pursuant to Article 25.6.1 of the MOA, the parties elected to proceed with this matter as an "immediate arbitration," where time is of the essence and the grievance procedural time limits are waived.

An evidentiary hearing was conducted before the undersigned Arbitrator on November 28, 2012, in San Jose, California. The parties introduced documentary evidence; witnesses were called to provide sworn testimony during both direct and cross-examination. Both parties presented oral closing arguments before the Arbitrator and the matter was submitted to the Arbitrator. In accordance with Article 25.6.7, the undersigned Arbitrator issued a "bench" decision. What follows memorializes that decision which was verbally conveyed to the parties at the conclusion of the hearing.

## ISSUE

The parties were unable to agree on a statement of the issue in dispute. The Arbitrator has framed the issue as follows:

Did the City of San Jose violate Article 51.1 and 51.2 of the parties' Memorandum of Agreement when it made preparations to outsource the positions of three employees of the Police Department who perform background investigations? If so, what is the remedy?

The City also asserts that the grievance in this matter was not filed within 21 calendar days following the events on which the grievance is based as required by Article 25.2.1 and, therefore, is untimely.

### **FACTUAL SUMMARY**

At the center of this matter is the language of Article 51 of the parties' Memorandum of Agreement. It provides:

51.1. The City has the discretion to contract out and/or civilianize twenty positions during the term of this Agreement.

51.2. Any contracting out and/or further civilianization of positions represented by the POA during the term of this Agreement would be subject to the meet and confer process. The City will provide advance notice to the POA and the opportunity to demand to meet and confer regarding contracting out and/or further civilianization of work currently performed by bargaining unit members (Joint Exhibit 1).

This language was added to the MOA as a result of bargaining that occurred in 2011. Language in prior agreements permitted the City to add civilian personnel to perform the work done by sworn police officers provided the number of positions in the POA bargaining unit would not be reduced as a result. Prior agreements also listed examples of duties that were normally associated with police officer status and could not be civilianized.<sup>1</sup> In the 2004-2008 MOU, the City was permitted to civilianize no more than four sworn positions and provided that any further civilianization was subject to the meet and confer process at the expiration of the MOA (Union Exhibit 3). In the 2008-2009 MOA, the cap on the number of sworn positions that could be civilianized increased

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<sup>1</sup> These duties included criminal investigations, patrol-related functions, emergency services, community policing, training of sworn personnel on public safety-related issues, and processing of prisoners. Under the terms of prior MOAs, sworn personnel performing these duties were not subject to civilianization.

to 15 (Union Exhibit 4). In the 2010-2011 MOA, the cap remained at 15 (Union Exhibit 5).

Bargaining history is discussed further below.

### **PARTIES POSITIONS**

*The Union's position.* The language of the MOU creates a "hard cap" of 20 on the number of positions the City can outsource. The City's reading of the contract (i.e., that it has the absolute discretion to outsource 20 positions and may civilianize and/or outsource additional positions as long as it meets and confers with the POA) is untenable. During bargaining, the POA agreed to a 10-percent salary reduction in order to save jobs. It would not, at the same time, have ceded to the City the power to outsource the entire workforce. Bargaining history supports the POA's interpretation of the contract language.

The POA did not waive its right to challenge the City's intention to outsource the background checkers when it declined to go to arbitration over the City's earlier decision to civilianize three other positions.

*The City's position.* The City has the discretion to contract out and/or civilianize 20 positions without meeting and conferring with the POA. The contract language is unambiguous. Throughout bargaining, the POA repeatedly signed off on the City's proposal. Staff reports and presentations to the City Council made the City's understanding of the rights conveyed by Article 51 clear and the POA made no protest.

The POA failed to file a grievance within the 21-day time limit.

### **DISCUSSION**

A preliminary matter is the City's argument that the grievance was untimely filed. Article 25 addresses the grievance procedure and Article 25.2.1 provides that a grievance

must be filed "within twenty-one (21) calendar days following the event or events on which the grievance is based." The City asserts that the triggering event occurred in March 2011, when it clearly informed the POA that it read Article 51.1 in a manner at odds with the position taken by the POA. Specifically, there is a series of letters between the City and the POA discussing the City's intention to contract out and/or civilianize three positions, i.e., the lieutenant over police personnel and two police officer positions in permits (Joint Exhibits 13, 14 and 15).

The POA convincingly argues, however, that the triggering event at the center of this grievance is the City's letter of July 24, 2011, which specifically concerns its plans to outsource the work of background investigators (Joint Exhibit 18). The fact that the POA chose not to file a grievance in response to the City's earlier notice of its intent to outsource bargaining unit work does not constitute an unmistakable waiver of its right to file a grievance over the interpretation of Article 51.1 and 51.2. And, it did not foreclose the POA from filing this grievance specifically challenging the contracting out of the work of background investigators. Accordingly, the grievance filed by the POA on July 26, 2011, was timely filed under Article 25.2.1.<sup>2</sup>

On the merits, the plain language of Article 51.1 conveys to the City the "discretion" to contract out and/or civilianize 20 positions and says nothing about meeting and conferring with the POA with regard to those positions. Its discretion is not subject to any conditions. Article 51.2, in contrast, concerns any contracting out and/or "further" civilianization of bargaining unit positions represented by the POA and expressly subjects these actions to the meet and confer process.

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<sup>2</sup> It also is worth noting that the City's Intent to go forward with outsourcing the background investigators took the City over what the POA considered to be the 20-position "hard cap."

The POA is correct that the word “further” modifies civilianization and not contracting out and that civilianization and contracting out are distinct concepts. However, in practice and depending on the circumstances, the City has used both mechanisms to reduce the amount of bargaining unit work. Moreover, the emphasis the POA gives to the placement of the modifier “further” is not supported by any other verbiage in Article 51 and could lead to an absurd result where further civilianization, but not contracting out, would be subject to the meet and confer process.<sup>3</sup>

Bargaining history also supports the City’s interpretation of the contract language. In prior agreements, the parties placed specific caps on the number of positions the City could civilianize. When the intent was to impose an outermost limit on the City’s contracting-out authority, the parties used “no more than” language to reflect that intent in the agreements. The current version of Article 51 does not include “no more than” language.

Prior agreements listed specific positions that could not be civilianized, but gave the City, “in its discretion,” the ability to “add civilian persons to perform the work currently performed by sworn personnel” so long as the number of bargaining unit positions was not reduced. In contrast, the language in the current agreement gives the City the unencumbered discretion to contract out and/or civilianize 20 positions during the term of this Agreement and conveys far greater discretionary authority to the City.

Alex Gurza, Director of Employee Relations, explained that the City came to the 2011 bargaining table facing tremendous fiscal problems and sought to eliminate many of the restrictive terms in Article 51 that had been carried over from prior agreements. The

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<sup>3</sup> Such a reading of the contract language also renders the phrase in Article 51.2 “any contracting out” mere surplusage.

City's proposal struck all the language of the prior agreements and proposed to replace it with the language as it now appears in Article 51.1 and 51.2. Several documents exchanged during the 2011 negotiations demonstrate the POA's acceptance of the City's civilianization proposal. Civilianization is listed among the proposals, interests, and issues first identified to the POA by the City in February 2011, when negotiations began (Joint Exhibit 5). A specific proposal containing the language that was agreed upon was passed by the City to the POA on March 7, 2011 (Joint Exhibit 6). And, in documents passed from the POA to the City on April 25, 2011 and April 29, 2011, the POA "accepts City's proposals regarding civilianization." (Joint Exhibits 7 and 8.) The City package of proposals dated May 2, 2011, includes as an attachment the language of Article 51 as it appears in the 2011-2013 MOA (Joint Exhibit 9). The tentative agreement signed off by the POA and the City on June 3, 2011 covers civilianization and/or contracting out and includes as an attachment the language of the current MOA (Joint Exhibit 10).

The record also includes a memorandum dated June 3, 2011, addressed to the Mayor and City Council that details the parties' tentative agreement. With regard to civilianization and/or contracting out, the memo from Mr. Gurza states: "The City will have the discretion to contract out and/or civilianize twenty positions during the term of this Agreement. Any further contracting out and/or civilianization of positions represented by the SJPOA during the term of this Agreement would be subject to the meet and confer process." (City Exhibit 2.) At a meeting of the City Council on June 14, 2011, Mr. Gurza presented a power point presentation that included a notation regarding civilianization. It read: "Ability to civilianize 20 positions and meet and confer over others," (City Exhibit 3.)

Lieutenant George Beattie was President of the POA during the 2011 negotiations and, along with Mr. Gurza, signed off on the tentative agreement (Joint Exhibit 10). A video tape recording of the City Council meeting of June 14 includes Mr. Gurza's presentation and Lieutenant Beattie's remarks to the Council. Lieutenant Beattie took no exception to Mr. Gurza's explanation of the new civilianization language in Article 51.

Sergeant John Robb, Officer Franco Vado, and Lieutenant Beattie — all of whom participated in the 2011 negotiations — testified there was not much discussion about Article 51 at the table and the City did not explain its understanding of the new language or place any emphasis on the change in language from the prior agreement. Each said, had he known the City's understanding that there were no caps on the number of positions that could be civilianized, the POA never would have agreed to the language. The POA explained that during the 2011 negotiations, its intent was to preserve jobs and it accepted a 10-percent salary cut in order to limit the number of layoffs. Given that, the POA reasons, it would not have agreed to contract language that puts no cap on the number of positions the City is permitted to contract out. Nor would it have agreed to allow the City to contract out and/or civilianize as many other positions as it desired beyond the 20 positions so long as it meets and confers with the POA.

The fact that the POA now characterizes the City's understanding of the contract language as patently unacceptable begs the question. What the parties actually agreed to at the bargaining table is what is at issue. The POA was aware of the unprecedented financial crisis facing the City and its desire to cut labor costs, in part, by having civilian employees take on the work traditionally performed by sworn officers. In fact, during the course of negotiations, the parties discussed and the POA posed no objection to the



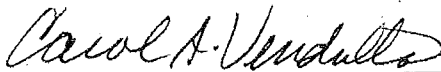
civilianization of certain positions. The POA accepted a 10-percent pay cut in order to limit the number of layoffs. Allowing a civilian employee to take on the duties previously performed by a sworn officer furthers the POA's goals of limiting layoffs and keeping a sufficient number of officers "on the streets."

The POA's view that the City's interpretation gives it "carte blanche" to "gut" the ranks of police officers and get rid of the entire bargaining unit is overreaching. Once the 20-position cap on discretionary outsourcing is reached, the City must notify the POA in advance of its desire to contract out and/or civilianize additional positions and then must engage in the meet and confer process in good faith. The POA need not agree to the City's request and the MOA does not give the City the authority to unilaterally impose its proposal until the parties have reached a genuine bargaining impasse. Even then, the parties' dispute may be subject to the City's post-impasse interest arbitration procedures and may be decided by an independent third-party neutral after an evidentiary hearing. In sum, an agreement to engage in good faith bargaining over future outsourcing proposals is not an illusory promise.

### CONCLUSION

For the reasons expressed above, the Grievance is DENIED.

Dated: December 7, 2012

  
**CAROL A. VENDRILLO, ESQ.**  
Arbitrator